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Supreme Court, U.S.
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No. 97-740

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

ROBERT SCHWALBE, *et al.*,

Petitioners,

v.

MICHAEL WALKER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Did the lower courts correctly identify clearly established law with materially similar facts [based upon standards even more stringent than this Court requires], thereby obviating the need for review or remand other than to order that Respondent's claim should proceed to trial?

II

Did the lower courts properly find that Respondent presented such significant evidence of unlawful intent that *Crawford-El v. Britton* would not affect the outcome of this case even if "clear and convincing" evidence is required?

III

Did the lower courts properly consider evidence of unlawful intent in holding that Petitioners violated clearly established law, where the conduct was not objectively legally reasonable, and where intent is an element of the underlying constitutional claim?

PARTIES BELOW

Respondent hereby shows that Mr. Roy Parrish was dismissed **without** prejudice in 1992. *Contra* Pet. at ii; Supreme Court Rule 15. 2.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Michael D. Walker, respectfully submits this Brief in Opposition to the Petition for Certiorari filed in the above-captioned case.

STATEMENT OF THE CASE

A. Statement of Facts

1. Preliminary Objection to Petitioners' Statement of Facts

Petitioners' statement of facts will not assist this Court. Petitioners continue to appeal improperly basing their claims upon facts viewed favorably to **them**. *See* Pet. App. A-15a (Farris, J.), -18a-21a (Birch, J., dissenting). Thus, in order to clarify the issues, and as required, Respondent has set forth below the facts as properly viewed by the lower courts. Supreme Court Rule 15.2.

2. Relevant Facts In the Record Before the Lower Courts

Respondent Michael Walker is an exemplary former employee of Vista Community Programs. During his tenure as Developmental Services Chief, he was responsible for supervising all Mental Retardation programs and budgets. Pet. App. A-2a-3a; -C-30a-31a. At appropriate times, Respondent voiced concerns about issues of public import, including excessive billing and faulty repairs by a garage that Vista employees were required to use (and where no bids had been taken); employee conflicts of

interest through a car wash business and other questionable uses of funds; budget reduction proposals that would harm mentally disabled clients; and others. *Id.* A-3a-4a; C-30a-32a.

Respondent expressed these concerns properly to Bob Wesley, Vista Area Director, and to Business Manager, Tom Nickell, but to no avail. *Id.* A-3a-4a; C-31a-33a. Since these issues could not be resolved within the agency, Respondent arranged in August, 1991, to attend an off-duty meeting with his elected officials and with high-level Vista employees Ernest Taylor and Nora Swafford. *Id.* A-4a; C-33a. The attendees discussed Respondent's budgetary concerns and a three-page list of "possible improprieties," including certain items about which Respondent had direct knowledge. *Id.* Respondent was primarily concerned about the budget proposals, the garage billing and repair practices, and the car wash business. *Id.* Respondent was not concerned that the budget proposal would affect his job, as he believed that he was protected by state merit system policies. *Id.*

As a result of this meeting and a later request by the legislators, the Department of Human Resources began an investigation into impropriety at Vista, conducted by David Nave of the Office of Fraud and Abuse. *Id.* Mr. Nave was assisted by Petitioner Schwalbe, who was assigned from DHR's Office of Audits. In October, 1991, Petitioner Dean informed Vista staff that Mr. Wesley and Mr. Nickell had been proposed for dismissal, and that Dean would assume the responsibilities of the Area Director position and Schwalbe, those of the Business Manager position. *Id*-A-4a-5a; -C-33a-34a.

Upon completion of the investigation, Mr. Nave's report confirmed the existence of severe problems within the agency and "a substantial amount of evidence to show negligence, inefficiency, misconduct and apparent violations of Georgia law . . . " *Id.* After the report was released on November 21, 1991, it received a great deal of media attention and caused embarrassment to many, including Petitioner Dean, who resigned because of the investigation, and certain Walker County Board of Health members whose conduct also had been questioned. Pet. App. A-5a, 9a-11a; -C-35a, 43a-45a. The Board members were upset that the legislators, and not they, had been contacted about these problems. The Board threatened to end the county's status as lead funding county for Vista. *Id*- A-5a; -C-35a.

Petitioner Schwalbe was then asked by the Walker County Board to examine certain contracts in fiscal years 1990-1991 between Respondent's wife, Crystal Walker, a teacher-specialist in early intervention programs, and Amanda Boyd, the Vista supervisor and director of the Walker County Service Center, who solely supervised Mrs. Walker's employment. *Id* -A-5a-6a; -C-35a-37a. Back in 1989, and before this arrangement was first approved, Respondent and Ms. Boyd had reviewed all available written policies regarding employment of relatives to ensure that the arrangement was permitted. *Id*-.A-5a; -C-37a. Respondent also directed Ms. Boyd to seek approval without his intervention from Vista officials, and after such was received, Respondent, Wesley and Petitioner Dean all signed these contracts. *Id.* During Crystal Walker's service, Respondent had no involvement whatsoever in the supervision of Crystal Walker's work. *Id.*-C-37a.

Notwithstanding these facts and the efforts made to ensure the propriety of this arrangement--as was explained to Schwalbe by both Respondent and Ms. Boyd--Schwalbe charged Respondent with violating nepotism policies and with "negligence and inefficiency." *Id.*-A-6a; -C-37a-39a. Respondent has at all times denied that he committed any infraction or impropriety, claiming that this punishment was instead substantially motivated by his protected speech. Indeed, Petitioner Dean "had a motive to retaliate against Respondent because his speech led to the investigation that led to Dean's resignation." Pet.App. A-10a. Petitioner Schwalbe also had a motive to punish Respondent in order to appease his superiors: the Board of Health members and Dean, who had been embarrassed by the publicity and by certain findings of the investigation. *Id* -A-10a-11a; C-44a.

Record evidence shows that Petitioner Schwalbe admittedly was asked to punish Respondent for his speech, although Schwalbe claims not have sanctioned him for *that* reason. (Respondent's Brief in Opposition to Petitioners' Brief on Appeal-16). Petitioners have offered **"no legitimate reason"** for punishing Respondent's speech. Pet. App. A-10a; C-42a-43a.

Further evidence of wrongful motive stemmed not just from Petitioners' punishment of Respondent, but especially, from the extremely harsh nature of the sanctions imposed, even ". . . where it appears that [Respondent] did everything he could to make sure he was acting within Vista regulations." Pet. App. A-10a-11a; *see also* C- 35a-37a, 44a-45a. Moreover, Petitioners' charging Respondent with "negligence and inefficiency" for directing Ms. Boyd to receive direct assurance from Vista supervisors that the arrangement was proper and approved ". . . is illogical

considering the situation. Walker may well have been attempting to make sure that there was no actual impropriety and no appearance of it, but we do not resolve questions of fact." Pet. App. A-11a. Also, Petitioners took myriad adverse actions against the **other** employees who had attended the meeting with the legislators, thereby confirming a pattern of unlawful motivation. Pet. App. A-11a; C-39a.

Petitioner Dean secured Respondent's demotion and transfer even though Dean had approved the very contracts at issue; signed off on other contracts that Dean knew violated nepotism policies and then lied about it; and refused to punish yet another [non-whistleblowing] supervisor for nepotism violations occurring at the very time of the investigation. (Respondent's Brief in Opposition to Petitioners' Brief on Appeal-16-18). Notwithstanding Respondent's excellent employment history and achievements, he became a "marked man" at Vista and, after being refused even an interview for his former position, he felt compelled to resign and to accept employment in the private sector. Pet. App. C-45a.

B. Proceedings Below

Respondent hereby clarifies the Petition by offering a more precise discussion of the district court's ruling at the preliminary injunction stage. Supreme Court Rule 15.2

The district court found " . . . there to be a substantial likelihood that the plaintiff will prevail on the merits at trial," and that plaintiff's speech was protected speech under the First Amendment and based upon all relevant criteria. (Respondent's Brief in Opposition to

Defendants' Brief on Appeal- 3.) The trial court concluded that "the inferences a jury would likely draw from the facts and circumstances . . . would be that the adverse action against Plaintiff as an employee was in retribution for his exercise of First Amendment rights." *Id.* The court found that **"it will be very difficult"** for [defendants] to prove that they would have punished Respondent absent his speech. (Tr. 316-317)(emphasis added).

The court only denied the preliminary injunction because it found "the public interest would be disserved" in light of an "ongoing investigation," [which, ironically, was later revealed to have been directed at the other whistleblowers, Taylor and Swafford.] Nonetheless, any initial question that the court might have had about Petitioners' motive did not affect the court's holding that a **jury** would likely rule in Respondent's favor. (Tr. 319-320). And any remaining doubt was clearly resolved in Respondent's favor based upon significantly developed evidence presented on summary judgment and then on appeal. Pet. App. C-27a-53a; A-1a-15a.

REASONS FOR DENYING THE WRIT

The Petition does not warrant this Court's acceptance. The claim that the courts below erred in identifying clearly established law based upon the facts viewed favorably to Respondent fails to meet the Court's requirements. Supreme Court Rule 10. Also, and despite Petitioners' attempt to cling to the bootstraps of *Crawford-El v. Britton* No. 96-827 (1997) (pending), this case's outcome should be unaffected by the decision. *Crawford-El v. Britton*, 93 F.3d 813 (D. C. Cir. 1996) (*en banc*). First,

the discovery issues raised in *Crawford-El* have no bearing on this case, which has been ready for trial for years. *Id.* at 819-820. More importantly, the lower courts already have found significant "non-conclusory assertions of evidence . . . from which a fact finder could infer the forbidden motive," including through direct and circumstantial evidence. These findings would meet if not surpass a "clear and convincing" standard even if adopted in *Crawford-El* Indeed, unless this Court adopts the standard urged by Petitioner and D.C. Circuit Judge Silberman--but not by **any** parties appearing in *Crawford-El*--that decision simply should not affect this case. Finally, the courts below properly considered intent in analyzing qualified immunity, as is consistent with Supreme Court precedent and most Circuit Court decisions.

ARGUMENT

1. The primary issue presented here does not merit review because it is purely contextual: whether the lower courts erred in their fact-based assessments--made favorably to Respondent--when applying proper legal standards to First Amendment and qualified immunity claims. Supreme Court Rule 10; *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Anderson v. Creighton*, 483 U.S. 635 (1987).

The district court, as affirmed by the Court of Appeals, performed a sensitive and thorough analysis under *Pickering*, as refined in such cases as *Connick v. Myers*, 483 U.S. 138 (1984) and *Waters v. Churchill*, 511 U.S. 661 (1994), and as applied by the Eleventh Circuit in *Bryson v. City of Waycross*, 888 F.2d 1562, 1565 (11th Cir. 1989), and *Beckwith v. City of Daytona Beach Shores, Fla.*, 58

F.3d 1554 (11th Cir. 1995). The district court carefully considered the important content of Respondent's speech and the proper conditions of his expression in holding the speech constitutionally protected. Pet. App. C-41a-43a. As the district court opined, "the Court can hardly imagine a more clearly protected instance of speech than Plaintiff's speech in this case." *Id.*-49a.

The Court of Appeals affirmed these findings and separately emphasized Respondent's "significant interest in speaking with the legislators in order to prevent harm" to the program and to the citizens served. *Id.* A-10a. Indeed, since the defendants presented **not one shred** of evidence of disruption from the speech, the lower courts properly found that defendants had "no legitimate reason" for punishing the same. *Id.*-A-10a-11a; C-42a-43a and nn.4-5. No more could be asked of courts applying the *Pickering* test, which is the **only** "purely legal issue" in determining qualified immunity on interlocutory appeal. And since the lower courts rightly found a genuine dispute about whether Petitioners were "substantially motivated" by Respondent's speech, there is no issue which merits this Court's review. *Id.* A-10a-11a, 15a; C-43a-45a; Supreme Court Rule 10.

Likewise, plenary review of the lower court's citation of "materially similar" cases would be pointless. Pet. at 14-15. First of all, the lower courts properly identified examples of "clearly established" cases with "materially similar" facts to confirm that "the contours of the right were sufficiently clear" so that Petitioners would know that their actions violated the law. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see* Pet. App. A-12a-15a; C-47a-49a, 51a-52a. In Respondent's opinion, the Court of Appeals has enforced a "clearly established law"

standard that is more difficult to satisfy than that of this Court. *Compare Anderson v. Creighton*, 483 U.S. at 640 ("the contours of the right [must be] sufficiently clear" to give notice of the violation) *with Lassiter v. Alabama A&M University*, 28 F.3d 1146, 1150 (11th Cir. 1994) *(en banc)* ("For qualified immunity to be surrendered, pre-existing law must dicate, that is, truly compel (not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what defendant is doing volates federal law in the circumstances;") *see also U. S. v. Lanier*, ___U.S.___, 117 S. Ct. 1219 (1997) (rejecting the Sixth Circuit's "substantially similar" standard as too stringent, albeit in a case involving criminal violations of constitutional rights). Thus, the lower court decisions for Respondent even under such strict standards confirm the merit of his claims.

Second, Petitioners' argument ignores the lower courts' correct, factual assumption that the punishment was substantially motivated by Respondent's speech, and not by claimed "nepotism," when the courts analyzed the clearly established law. Pet. App. A-10a-11a, 15a; C-43a-46a, 51a-52a. Based upon this assumption, the lower courts aptly identified First Amendment cases involving speech "materially similar" in content, form and context to Respondent's. *Id.* at A-14a; C-47a-49a.

Despite criticism from the lower courts, Petitioners continue to claim that they *could* demote an employee for violating an anti-nepotism policy because this asserted reason would not violate constitutional rights. This argument "miss[ed] the point" and was described as "inapposite" since it did not address whether Petitioners violated clearly established law for punishing Plaintiff's

speech. *See* Pet. App. A-14a-15a; C-42a-43a and nn. 4-5, 51a-52a; Pet. at 14-15. Indeed, Judge Birch dissented in part and sought to disallow review of Petitioners' argument, which ". . . effectively requires that we decide a factual issue . . . based neither on the record nor the drawing of reasonable inferences based on facts previously found. In my opinion, this type of purely factual decision-making is not the proper subject of an interlocutory appeal based on qualified immunity." *Id.*- A-18a-21a (Birch, J. dissenting). In any event, this argument clearly deserves no further consideration.

2. Petitioner argues that proof of unlawful motive must rest upon "clear and convincing evidence," a standard advocated by the plurality opinion in *Crawford-El v. Britton*. Pet. 7-8, 12-13. Respondent opposes any heightened summary judgment standards for determining genuine issues of fact in constitutional cases involving intent, and agrees with the dissenting opinion in *Crawford-El*. 93 F.3d at 847-end.

Furthermore, Respondent disagrees that an actual conflict exists between the other Circuit Courts of Appeals, which uniformly consider evidence of intent and generally apply ordinary summary judgment rules for determining genuine disputes of material fact. Supreme Court Rule 10 (a); s*ee* Pet. App. A-13a-14a (citing cases); *see also Grant v. City of Pittsburgh, et. al.*, 98 F.3d 116 (3d. Cir. 1996); *Alexis v. McDonald's Restaurants of Massachusetts*, 67 F.3d.341, 348-349 and n.7 (1st Cir. 1993); and *Hill v. Shelander*, 992 F.2d 714, 717 (7th Cir. 1993).

Importantly, though, and as mentioned above, *Crawford-El* will not affect this case because the Court of

Appeals explicitly found the existence in the record of specific "direct and circumstantial evidence" of intent, which clearly would suffice under the *Crawford-El* standard; hence, there is no need for remand. *Compare* Pet. App. A-9a-11a *with* 93 F.3d at 819 (the plaintiff must present "specific, non-conclusory . . . evidence . . . from which a fact finder could infer the forbidden motive.")

3. Finally, Petitioners urge a qualified immunity standard that ignores altogether the actor's subjective intent even when the plaintiff has shown that the conduct did **not** meet an "objective legal reasonableness" test. This argument misconstrues the holdings of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985), and *Anderson v. Creighton*, 483 U.S. 635, 639 (1987); Pet. at 8-12. Furthermore, it is contrary to this Court's recent decisions, and fundamentally, to the reasons for which citizens can recover for constitutional wrongs.

In *Johnson v. Jones*, 515 U.S. 304 (1995), this Court disallowed an interlocutory appeal from a denial of qualified immunity based only upon a factual assertion that the officials had not engaged in the challenged conduct. The Court gave several reasons for its holding, even while noting that the denials of qualified immunity would cause constitutional torts with disputed issues of fact about intent to go to trial.

> Many constitutional tort cases . . . involve factual controversies about, for example, intent -- controversies that, before trial, may seem nebulous . . . We recognize that, where a district court's denial of summary judgment amounts to . . .

> a determination about 'genuine' issues of fact for trial, it still forces public officials to trial . . . . **Nonetheless, the countervailing considerations that we have mentioned (precedent, fidelity to statute, and underlying policies) are too strong to permit the extension of *Mitchell* to encompass appeals from orders of the sort before us . . .**

Johnson v. Jones, 515 U.S. at 316 (emphasis added); *see also Richardson v. McKnight*, ___U.S.___, 117 S.Ct. 2100, 2103 (1997) (The basic purpose of Section 1983 "is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights" and to provide related relief); *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) ("[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional gurantees.")

Since many substantial, clearly established constitutional violations depend upon proof of intent, the standard urged by Petitioners would defy the very purposes for which the laws were passed, and would exceed *Harlow's* mandate to apply qualified immunity [only] when "**insubstantial claims**" are brought against government officials. *Harlow*, 457 U.S. at 814. This Court should reject this argument in no uncertain terms.

CONCLUSION

This Court should deny the Petition for Writ of Certiorari presently.

Respectfully submitted,

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